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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 5.

FRED L. SHUTTLESWORTH,
Petitioner,

vs.

CITY OF BIRMINGHAM.

On Writ of Certiorari to the Court of Appeals of the State of Alabama.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

Respondent feels the statements of "questions presented" by petitioner are in some material degree inaccurate or misleading and should be rephrased.

1. Whether as applied to one who is a member or part of a group of ten or twelve persons standing or loitering on a sidewalk on a corner in the heart of the business district of a city so as to block or interfere with free passage of other pedestrians and force them out into the

street occupied by vehicular traffic, absent any question or issue of free assembly or free speech, an ordinance aimed at promoting free flow of traffic and making it an offense to continue to so stand or loiter after having been requested by a policeman to move is vague and overbroad in violation of the Fourteenth Amendment.

2. Whether as applied to one described in question one, the two sentences of a paragraph of an ordinance entitled "Streets and sidewalks to be kept open for free passage," and construed by a state court to state a single offense, may nevertheless be separated into two elements and as thus severed successfully attacked for vagueness or overbroadness as though two separate offenses were involved, one for obstructing free passage and the other for refusing to heed the request of an officer to move.

3. Whether one described in questions one and two above, who is tried on a complaint containing two counts, the first of which charges violation of the ordinance referred to in questions one and two, and the second count charging violation of an ordinance construed by the state court as making it an offense to refuse or fail to comply with an order concerning vehicular traffic, can sustain a contention that due process is lacking for total absence of evidence to support count two in violation of due process, and if so a reversal of the general conviction on the complaint as charged where the penalty for only one offense is assessed is warranted.

STATEMENT OF CASE.

Petitioner was charged and convicted in Alabama Circuit Court on a complaint containing two counts. The first count charged the blocking or obstructing of free passage on the sidewalk and failure to cease such blocking or obstructing free passage after request by a police officer to do so as proscribed by Section 1142 of the General City Code of 1944. The second count charged failure

to obey a reasonable and lawful order of a police officer in violation of Section 1231 of such Code. This section was construed by the Court of Appeals of Alabama to be limited to lawful orders having relation to vehicular traffic upon the street. **Phifer v. City of Birmingham,** 42 Ala. App. 282, 160 So. 2d 898, 901.

That court construed 1142 as not involving in its application in this case any question of free speech, and upheld its constitutionality as thus applied in this case. The tendencies of the evidence of the City was summarized and held sufficient to sustain a conviction but in which only one sentence was imposed under Counts one and two.

The findings of the Court of Appeals both that the petitioner was in violation of 1142 by blocking or obstructing free passage upon the sidewalk and failing to clear the blockage or obstruction after being requested by a police officer to do so and that no first amendment freedoms were involved in the incident in the nature of free speech or free assembly is amply supported by the record. Also we feel the evidence was sufficient to support a conviction under Count two relating to 1231.

We here make reference to the evidence in the record which we feel fully supports the conclusion of the Court of Appeals of Alabama.

The following facts were established by the evidence introduced in the trial court. On April 4, 1962, at about 10:30 A. M., Officer Robert E. Byars, Jr., observed the petitioner, along with James Phifer and three or four other people walking south on 19th Street toward 2nd Avenue, North, Birmingham, Alabama (R. 16, 19). Officer Byars then entered Newberry's Department Store at its alley entrance and walked to the front of the store at 19th Street and 2nd Avenue, North (R. 16, 17). When he got to the front entrance he saw the petitioner standing in a group of ten or twelve people (R. 17, 27, 38). They

were on the northwest corner of 2nd Avenue and 19th Street (R. 17, 27, 40, 59). The group was standing (R. 17, 38). The traffic light changed a number of times while they stood there at the intersection (R. 36). The group blocked pedestrian traffic to such an extent that some people walking east on the north side of 2nd Avenue had to walk into the street, thereby interfering with vehicular traffic[1] (R. 17, 20, 28, 39). Petitioner was a member of this group (R. 17, 18). Officer Byars watched the group for a minute to a minute and a half before accosting them (R. 18, 26, 28). Officer Byars then walked up to the group and informed them they would have to move on and clear the sidewalk so as to allow free passage of pedestrian traffic and not obstruct the sidewalk (R. 18, 27, 28). While Officer Byars was talking to the group he was observed by Officer James Paul Renshaw, a police patrolman on motorcycle (traffic) duty (R. 40, 43, 47). Officer C. W. Hallman, a traffic policeman (R. 59), Officer John D. Allred, police patrolman also on traffic duty (R. 66, 70), and Cecil W. Davis, a traffic officer (R. 73, 74).

When Officer Byars first spoke to the group requesting them to move (R. 28, 31, 41, 47, 49), only a small part moved. Petitioner did not move (R. 18, 41, 49, 60). After a short while, the officer informed the group a second time they would have to move and not obstruct the sidewalk in order to permit pedestrian traffic to move unhampered (R. 18, 28). Petitioner and some others in the group did not move and petitioner stated: "You mean to say we can't stand here on the sidewalk?" (R. 18, 28.) Officer Byars did not do or say anything for a short period and then he told the group that he was telling them the third and last time to move or they would be arrested for obstructing the sidewalk (R. 18, 41, 60). Petitioner

[1] The only logical conclusion to be drawn from the testimony of the witnesses that pedestrians were forced into the street is that such pedestrians interfered with vehicular traffic in the street.

was still in the group (R. 18, 28, 41, 49, 59, 60, 74). Everybody began to move but him (R. 28). Petitioner did not move but made the statement "You mean to tell me we can't stand here in front of this store?" (R. 18.) Officer Byars then informed petitioner that he was under arrest, after which time petitioner moved away saying: "Well, I will go into the store" (R. 18, 20, 41, 52). Officer Byars followed petitioner into Newberry's store and took him into custody (R. 18, 19).

Officer Byars had heard that a boycott or selective buying campaign was in progress at the time he arrested petitioner, but he had not been informed by his superiors that such boycott or selective buying campaign was going on and received no assignment relating to it (R. 24, 25). Officer Byars did not know either petitioner or James S. Phifer, co-defendant in Circuit Court, at the time he arrested them (R. 16, 22, 23). In fact, this is corroborated by Robert J. Norris, a defense witness when he testified that Officer Byars never called petitioner by name (R. 99). In fact, even petitioner adimts that Officer Byars did not call him by name.

Officer James P. Renshaw, who was going south on 19th Street between 3rd Avenue and 2nd Avenue (R. 40), testified he saw the group talking to Officer Byars. Officer Renshaw was on a motorcycle and he got off and went to Officer Byars (R. 41). Officer Renshaw reached Officer Byars in time to hear him tell the group the third time to move (R. 41, 49). Officer Renshaw was present when petitioner was arrested (R. 52), but he did not assist in the arrest (R. 48). No one assisted Officer Byars in making the arrest.[1] Officer Renshaw testified that there were

[1] While Officer Renshaw testified that he assisted Officer Byars in the arrest, elaboration of his testimony revealed his assistance consisted of nothing more than being present (R. 48). In fact, the petitioner admitted that Officer Byars was the arresting officer (R. 112, 113) and this was corroborated by James S. Phifer (R. 128).

about eight or ten or twelve people in the crowd when told the third time to move (R. 49) and that some may have moved off at the time. Officer Byars told petitioner he was under arrest (R. 52). Officer Renshaw had heard that the Negroes of the City of Birmingham were engaged in a selective buying campaign but he knew of no orders issued by his superiors concerning such campaign (R. 43, 44). At the time Officer Byars arrested petitioner, Officer Renshaw knew petitioner but didn't know James Phifer (R. 40). Although he didn't know James S. Phifer by sight he knew he was a notorious person in the field of civil rights in the City of Birmingham (R. 46).

Officer Hallman testified that he was a traffic policeman working traffic at the intersection of 2nd Avenue, North, and 19th Street (R. 59). He first saw the group talking to Officer Byars (R. 59). When he first saw the group he was talking to Officer Davis about a message to call his (Officer Hallman's) home (R. 59, 61). Officer Hallman and Davis arrived in time to hear him say to the group, "I am telling you for the third time you will have to move on, you are blocking the sidewalk" (R. 59). There was still five or six in the group and they all moved away except petitioner (R. 60) and Officer Byars then arrested petitioner (R. 60). At the time of petitioner's arrest Officer Hallman had heard about a selective buying campaign but had heard nothing from his superiors concerning such campaign (R. 63).

Officer John D. Allred, patrol division on traffic duty, testified he had left roll call (R. 69) and was on his way to 3rd Avenue and 20th Street (R. 66, 68, 69) where he was to work traffic (R. 66, 68). He was about twenty-five or thirty feet south of the alley by Newberry's and was giving directions to some people when he first heard Officer Byars tell the group they would have to move on (R. 66, 69). Officer Allred did not go to Officer Byars until after the arrest of petitioner but continued to give

directions to the people he was talking to (R. 67, 70). Officer Allred estimated the size of the group at maybe ten or fifteen or twenty people (R. 71).

At the time of petitioner's arrest Officer Allred did not know petitioner (R. 68).

Officer Cecil W. Davis testified he was patroling parking meters on a motorcycle (R. 76) but at the time he first observed the group talking to Officer Byars he was delivering a message to Officer Hallman (R. 77). Officer Davis was with Officer Hallman when he first observed the group with Officer Byars (R. 73). He testified there was about ten or twelve in group (R. 74). Officer Davis crossed the street to where Officer Byars was in time to hear him tell petitioner he was under arrest (R. 74), and there was still a crowd around petitioner at that time (R. 74). He heard Officer Byars tell petitioner he was under arrest (R. 74). At the time of petitioner's arrest Officer Davis had heard about the selective buying campaign but no one at police headquarters had discussed it with him (R. 78). Officer Davis knew both petitioner and James S. Phifer.

The evidence is without dispute that Byars did not know Shuttlesworth prior to the arrest (R. 29) nor did Shuttlesworth know Byars (R. 113). Byars did not address Shuttlesworth by name (R. 112).

Byars did not know Phifer prior to the arrest (R. 16, 22-23). Byars also was not known to Phifer (R. 128). Officer Byars was on traffic duty and had no assignment relating to the boycott he had heard was supposed to be in progress (R. 24).

No claim is made by petitioner or his witnesses of any activity involving freedom of speech or assembly. As Shuttlesworth expressed his version of the incident they were walking as pedestrians walk and simultaneously as they approached the light at the corner the officer came out of the door and said "move on" (R. 111, 112).

SUMMARY OF ARGUMENT.

I.

Count one of respondent's complaint charged petitioner with violation of Section 1142 of the General Code of Birmingham. Count two of respondent's complaint charged petitioner with violation of Section 1231 of the General Code of Birmingham. Each section and each count based thereon embrace a single offense. Petitioner argues that if either count is based on a constitutionally vulnerable section his conviction should be reversed. Both sections are however, constitutionally valid. In addition to this, however, petitioner has not followed the proper state court procedures to raise the question insofar as Section 1231 is concerned and this Honorable Court should not even consider the validity of this section.

II.

Section 1142 of the General Code of Birmingham insofar as it makes it unlawful to stand or loiter on any sidewalk of the city after having been requested by a police officer to move on is neither vague, overbroad, nor constitutionally objectionable. As written the ordinance does not give policemen absolute or arbitrary power to order any citizen off the streets. As written it is a valid police regulation. Neither the provisions of Section 1142 nor its construction and application in this case involve free speech or any other freedoms protected by the First-Fourteenth Amendments. Section 1142 gives fair notice of its proscriptions. The Alabama Court did not construe this section as shifting the burden of proof to the defendant to disprove that he was loitering so as to obstruct free passage.

III.

Section 1142 of the General Code of Birmingham, insofar as it makes it unlawful to so stand, loiter, or walk on any sidewalk in the city as to obstruct free passage thereon is not vague and overbroad. This provision does not involve any first amendment freedom and it has not been construed to apply to any such situation.

IV.

The conviction of petitioner for violation of Section 1231 of the General Code of Birmingham, making it unlawful to refuse to comply with a lawful police order is based on ample evidentiary support, but even if it were held otherwise, reversal of the conviction of petitioner would not be warranted because his conviction is sustained under Count one.

ARGUMENT.

I.

Point I of Petitioner's Argument Is Without Merit.

Petitioner in this section of his argument argues that the complaint charged two separate offenses in Count One and a third offense in Count Two with the conclusion that reversal should follow if either is constitutionally vulnerable.

In reply to the contention of petitioner in Section 1 of his Argument, pages 13 and 14 of his brief, citing **Stromberg v. Carlson; Williams v. North Carolina,** and **Thomas v. Collins,** we take the position that the principle of these cases cannot be given application in the manner employed to make two charges out of Count One, which is based upon Ordinance 1142, nor to present for review the Constitutionality vel non of Ordinance 1231.

First, the holding of these cases is simply that where a conviction is upheld in a state appellate court on pleadings charging more than one violation, the verdict or judgment being general, and it being impossible to know whether the conviction was upon the one charged or the other, the conviction will be reversed if any of the charges are unconstitutional, because the conviction may have been based thereupon.

The record in this case clearly shows in respect to count one that only one charge was lodged against petitioner under this count. Neither the trial court nor the Alabama Court of Appeals, nor the City, nor anyone, prior to certiorari to this Honorable Court, ever mentioned, or so far as we know, ever imagined or speculated that the petitioner was charged with loitering or standing upon the sidewalk so as to obstruct free passage

thereupon and also with merely standing or loitering on the sidewalk after being requested to move on.

No mention of such contention was ever made in any demurrer or other pleading filed by petitioner nor at any other time so far as the record shows.

The complaint filed by the attorney and upon which Shuttlesworth was tried connects and ties the two sentences of the last paragraph of 1142 together in one charge.

Count one[1] charges defendant loitered upon the sidewalk, a member of or within a group which obstructed free passage or did loiter or stand while in said group (we interpolate, the group loitering or standing to block free passage on the sidewalk) after having been requested by a police officer to move on.

There can be no doubt whatsoever that the Alabama Court of Appeals construed the ordinance and the complaint to charge both a blocking or obstruction of free passage and also a failure to move after having been requested to do so by a police officer. The evidence summarized by the court spelled out both elements of obstructing and request to move.[2]

---

[1] Count One. "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution and within the City of Birmingham, or the police jurisdiction thereof, did stand, loiter or walk upon a street or sidewalk within and among a group of other persons so as to obstruct free passage over, on or along said street or sidewalk at, to-wit: 2nd Avenue North, at 19th Street or did while in said group stand or loiter upon said street or sidewalk after having been requested by a police officer to move on, contrary to and in violation of Section 1142 of the General City Code of Birmingham of 1944, as amended by Ordinance Number 1436-F" (R. 2-3).

[2] We have quoted this summary on page 34 of this brief.

In the case of **Middlebrooks v. City of Birmingham**, . . . Ala. App. . . ., 170 So. 2d 424, the Alabama Court of Appeals followed the construction in the Phifer and Shuttlesworth cases, of the second paragraph of Section 1142, in the following language:

> "This is the fourth case in the last year wherein this court has considered the second paragraph of Section 1142 as amended. That provision is directed at obstructing the free passage over, on or along a street or sidewalk by the manner in which a person accused stands, loiters or walks thereupon. Our decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense."
>
> "That there must also be a showing of the accused's blocking free passage is the ratio decidendi of **Phifer v. City of Birmingham**, 42 Ala. App. 282, 160 So. 2d 898, and **Shuttlesworth v. City of Birmingham**, 42 Ala. App. 296, 161 So. 2d 796. In this respect, we distinguish our reasoning from that employed by the Virginia Supreme Court of Appeals in **Tinsley v. City of Richmond**, 202 Va. 707, 119 S. E. 2d 488."

Under this construction it is clear that only one offense is contained in the second paragraph of Section 1142 as amended. As construed, this Section is a reasonable exercise of the state's police power and is constitutionally valid. This construction placed on this ordinance in the Phifer, Shuttlesworth and Middlebrooks cases is also binding upon this Honorable Court. The rule in this regard has been stated in **Garner v. State of Louisiana**, 82 S. Ct. 298, 368 U. S. 157, as follows:

> "Whether the state statutes are to be construed one way or another is a question of state law, final decision of which rests of course with the Courts of the State."

As to Ordinance 1231, and as to which we feel only a very general and possibly no serious effort was made in petitioner's brief to attack its constitutionality we respectfully urge the record does not present its constitutionality for review. The method sought to be employed to raise the constitutional question in the trial court was by motion to quash and demurrer. The Court of Appeals of Alabama did not reach for consideration its constitutionality because of the failure of petitioner to comply with state court procedural requirements. Petitioner on page 11 of his brief concedes this.[1]

In the Shuttlesworth case, the Alabama Court of Appeals adopted its ruling in the companion, **Phifer**, case, with respect to the assignments relating to the motion to quash and the ruling on demurrer, and did not further deal with these assignments of error.

The Court of Appeals of Alabama held in the **Phifer** case, 160 So. 2d 898, 42 Ala. App. 282, ruling on motion to quash was not reviewable on appeal. **White v. City of Birmingham**, 41 Ala. App. 181, 130 So. 2d 231.

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[1] "In Phifer, the Alabama Court of Appeals sustained the overruling of a motion to quash and demurrers by petitioner Shuttlesworth's co-defendant below, these documents being identical to those filed on behalf of Shuttlesworth. Phifer's constitutional attack on Section 1142, the loitering ordinance, was rejected on the merits; Phifer's challenge to Section 1231 was not reached, because While the demurrer in its caption is directed to the complaint "and to each and every count thereof, separately and severally," it is really interposed to the two counts of the complaint jointly.' 42 Ala. App. at ...., 160 So. 2d at 900. Whatever the force under state law of this esoteric ruling that a paper expressly captioned 'several' is to be deemed 'joint', it is clear that the ground is insufficient to bar this court's review on the merits of the attack on Section 1231. Any 'objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore, sufficient to preserve the claim for review here.' Douglas v. Alabama, 380 U. S. 415, 422, see Henry v. Mississippi, 379 U. S. 443 (1965). In any event, the matter is immaterial because petitioner's attack on Section 1142 is dispositive of the case. See pp. 17-18 infra."

The assignment of error relating to the ruling on demurrer was overruled for the reason both that the several grounds of demurrer assigned were so broad in scope as to embrace the whole complaint,[2] and the assignment of error was so broad as to embrace the whole complaint. Consequently the demurrer and the assignment of error based on the ruling on it could be sustained only if the complaint was bad in its entirety and as to each count.

These principles of procedural law have been well established and uniformly applied by the Appellate Courts of Alabama over a half century. **Cahaba Coal Co. v. Elliott**, 62 So. 808, 810, 183 Ala. 298; **Allison-Russell Withington Co. v. Sommers**, 121 So. 42, 219 Ala. 33; **Western Railway of Alabama v. Arnett**, 34 So. 997, 1000 last paragraph, 137 Ala. 414; **Howison v. Oakley**, 23 So. 810, 118 Ala. 215; **Webb v. Litz**, 39 Ala. App. 443, 102 So. 2d 915.

The Alabama Appellate Court did discuss the constitutional attack upon the last paragraph of 1142 and found that it was not aimed at free speech, but was a legitimate exercise of police power by the municipality to enact and enforce reasonable regulations for the control of traffic and the use of its streets and sidewalks.

In support of this conclusion the Alabama Court cites decisions from other states including Washington, Virginia and California.[3] In Section II of this brief we shall

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[2] The Court of Appeals set out the grounds of demurrer challenging the ordinances in the *Phifer* case. It is clear that each of the grounds attacked both ordinances 1142 and 1231 in the conjunctive and therefore were directed to both counts. *Phifer v. City of Birmingham*, 160 So. 2d 898, 899.

[3] City of Tacoma v. Roe, 190 Wash. 444, 68 P. 2d 1028; Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222; Ex Parte Bodkin, 86 Cal. App. 2d 208, 194 P. 2d 588. Other cases which might also have been appropriately cited include: Minnesota, State v. Sugarman, 126 Minn. 477, 148 N. W. 446; Pennsylvania, Challis v. Pennsylvania, 8 Pa. Sup. 130, 132; Iowa, City of Chariton v. Fitzsimmons, 54 N. W. 146, 87 Iowa 226; and also the later Virginia case, Tinsley v. City of Richmond, 202 Virginia 707, 119 S. E. 2d 488, app. dismissed, 368 U. S. 18.

attempt to elaborate upon the correctness of the ruling of the Court of Appeals sustaining the constitutionality of 1142.

To return to Count two involving 1231, the United States Supreme Court has recognized the right of the State Court to apply reasonable procedural rules of the state even to the point that it may properly decline to rule on a constitutional question and when it does in good faith apply consistently and uniformly a well established procedural rule the constitutional question is not before the United States Supreme Court. **Barbour v. State of Georgia,** 248 U. S. 454, 39 S. Ct. 316; **Herndon v. State of Georgia,** 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530, rehearing denied 56 S. Ct. 82, 296 U. S. 661, 80 L. Ed. 471; **Hiawassee River Power Co. v. Carolina Tennessee Power Co.,** 252 U. S. 341, 40 S. Ct. 330; **Williams v. State of Georgia,** 349 U. S. 375, 99 L. Ed. 1161.

More recent decisions of this court in **Douglas v. State of Alabama,** 380 U. S. 415, 422, 85 S. Ct. 1074, and **Henry v. State of Mississippi,** 379 U. S. 443, 85 S. Ct. 564, are cited in the last sentence of footnote 9 on page 11 in petitioner's brief quoted by us in footnote 3 on page 13, ante. These cases and older cases such as **Wright v. State of Georgia,** 373 U. S. 284, 83 S. Ct. 1240, and **Davis v. Wechsler,** 263 U. S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143, recognize the right of this Honorable Court to examine the procedural rule in question and determine if any reasonable State interest is conserved by the application of the procedural rule and whether it may in fairness be invoked.

We think the ancient rules applied in this case were fairly and properly applied. It is of interest that after citing the first two of the above cases, petitioner indicates he is not pressing for the application of these cases here, but chooses to rely instead on his claim of unconstitution-

ality of 1142.[4] This minimizing of reliance upon these cases seems to be implicit in the strategy employed in Section IV of petitioner's brief in which he addresses his argiment primarily to a claimed lack of evidence to support a conviction on this count and the statement[5] made on page 29 of his brief that but for the restrictive construction placed on 1231 by the Court of Appeals of Alabama, it would be subject to the vices he claims inheres in 1142.

Point II (A & B) of Petitioner's Argument Are Each Without Merit.

II-A.

THE LAST SENTENCE OF 1142 IS NOT VAGUE OR OVERBROAD.

Petitioner in this section of his argument seeks reversal of the conviction of petitioner by attempting to split the last paragraph of Ordinance 1142 in half and to separate the last sentence from the first sentence and in so doing contends that such sentence is over broad and in violation of the First and Fourteenth Amendments.

We have already in Section I of this brief presented our contention that this artificial attempt to split this paragraph into separate charges is not permissible in this case. The charge made against petitioner in Count one and proven by the City's evidence was that he, together with or in a group of ten or twelve blocked or obstructed

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[4] "In any event, the matter is immaterial because petitioner's attack on Section 1142 is dispositive of the case. See pp. 13-14 infra." Pet. brief, p. 11.

[5] "If construed as broadly as it is written, Birmingham Code 1231, making it 'unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer,' would be objectionable for the reasons stated in pp. 14-15, supra. The Alabama Court of Appeals, however, has put a quite narrow construction on the section." Pet. brief, p. 29.

free passage on the sidewalk and failed to move and clear the sidewalk for free passage after having been requested to do so by the officer on three separate occasions.

The ordinance in question, either considering the last paragraph as containing one or two proscriptions, was not in this case construed to prohibit or interfere with freedom of speech or any other amendment one freedoms or rights. The Court of Appeals of Alabama expressly stated they were not applying it to any situation involving such constitutionally guaranteed freedom. **City of Birmingham v. Phifer**, 42 Ala. App. 282, 160 So. 2d 898, 900:

> "Section 1142, as amended, of the General City Code of Birmingham, is not aimed at free speech. It directs the manner in which sidewalks and streets may not be used. A municipality has the right under its police power to enact and enforce reasonable regulations for the control of traffic and the use of its streets and sidewalks."

On its face and under the construction placed upon 1142 it proscribes conduct, not a facet of freedom of speech and assembly, which results in obstructing the free and unimpeded use of the sidewalks and streets for pedestrians and vehicular traffic respectively.

No contention was made at any time that Shuttlesworth and his associates were involved in any facet of free speech or free assembly on the occasion of his arrest. The record clearly negates any such claim. Petitioner and each of his witnesses claimed that they were merely walking along the sidewalk as any other citizen to get from one point in the City to another. There was no demonstration. There was no picketing. There was no parading. There was not even any hint of any activity involving freedom of speech or assembly or any other first amendment freedom.

All that is here involved is the simple right of the municipality under its police power to control and regulate the use of its sidewalks and streets as passageways to permit pedestrians and vehicular traffic a safe, proper and unimpeded use thereof.

The constitutionality of 1142 must be tested in this case by the principle given application by this Honorable Court in **Cox v. New Hampshire,** and **Cox v. Louisiana,** 379 U. S. 536, 85 S. Ct. 453.

These cases illustrate the principle long adhered to by this Honorable Court that unless by its express language or by construction placed upon it by the state courts, an ordinance or statute impinges upon the first amendment freedoms, such ordinance or statute is not unconstitutional when its application is limited to simply conserving public convenience and safety in the use of sidewalks and streets for the purpose they were designed.[1]

In **Cox v. Louisiana,** a statute[2] on its face aimed at free and unobstructed passage upon public sidewalks and streets was construed by the Supreme Court of Louisiana

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[1] Mr. Justice Goldberg in the majority opinion in Cox v. Louisiana recognizes that even freedom of speech and assembly may have to give way to overpowering public convenience and safety in use of the streets (Headnotes 11-13).

[2] "Obstructing Public Passages. No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, water craft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

"Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions."

to be applicable in a first amendment situation involving a civil rights demonstration.[3] Because of this construction by the Louisiana Court, this Honorable Court held the statute as thus applied to **Cox** to be unconstitutional and reversed his conviction.

> "(19) It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" * * * (and with) a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways * * *."' Cox v. State of New

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[3] In *Cox* there appeared to be no statute providing for peaceful parades or demonstrations. The 1944 General City Code of Birmingham made provision for peaceful parades or demonstrations in Section 1159:

"Sec. 1159. Parading. It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

The two preceding paragraphs, however, shall not apply to funeral processions."

Hampshire, supra, 312 U. S. at 576, 61 S. Ct. at 766. See Poulos v. State of New Hampshire, supra.

"(20) But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It follows, therefore, that appellant's conviction for violating the **statute as so applied and enforced must be reversed.** (Emphasis supplied.)

"For the reasons discussed above the judgment of the Supreme Court of Louisiana is reversed." **Cox v. Louisiana,** 85 S. Ct. at page 466.

The statement from **Cox v. Louisiana** above quoted serves to distinguish that case from the present one. It also serves to distinguish a host of other cases relied upon by petitioner in his brief. Most of these are referred to by Mr. Justice Goldberg in his statement (85 S. Ct. 453, at page 464):

"(10) Appellant, however, contends that as so construed and applied in this case, the statute is an unconstitutional infringement on freedom of speech and assembly. This contention on the facts here presented raises an issue with which this Court has dealt in many decisions. That is, the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly. See Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; Hague v. CIO, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Schneider v. State of New Jersey, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155; Thornhill v. State of

Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Largent v. State of Texas, 318 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873; Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574; Kovacs v. Cooper, 336 U. S. 77, 69 S. Ct. 448, 93 L. Ed. 513; Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, 280; Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280; Poulos v. State of New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105."

Petitioner also contends that this ordinance failed to give him fair notice as to its proscriptions. The enactment here treated by petitioner as the "ordinance" is the last sentence of Section 1142:

> "It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move."

Even if this sentence is taken out of context and separated from the first sentence it is still a valid enactment. An enactment almost identical to the above was considered in the case of **Tinsley v. City of Richmond,** 202 Va. 707, 119 S. E. 2d 488. In that case as in this one, the attack was directed at the vagueness, ambiguity and lack of standards in the ordinance.

It is admitted by the opinion in Tinsley that the ordinance does confer discretionary power on police officials but the court pointed out the following exception:

> "We have, however, also recognized a well established exception to this rule. This exception applies in instances where it is difficult or impractical to lay

down a definite or comprehensive rule, or where the discretion relates to the administration of a police regulation and is essential to the public morals, health, safety and welfare."

Another statement of this rule is found in **Tinsley** where it quotes 12 A. L. R. 1435:

"It is also well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but, on the other hand, some situations require the vesting of some discretion in public officials, as for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare."

The general scope and authority of a police officer in giving orders in the performance of his duties is discussed in State v. Taylor, 119 A. 2d 36, 38 N. J. Sup. 6, in the following language:

". . . The duty of police officers, it is true, is 'not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In performance of their duties they may give reasonable directions.' **People v. Nixon**, 248 N. Y. 182, 188, 161 N. E. 463, 466. Then they are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them, and only when they exceed that discretion do they transcend their authority and depart from their duty. The assertion of the rights of the individual upon trivial occasions and in doubtful cases may be ill-advised and inopportune. Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere

with the public order and lead to a breach of the peace." **People v. Galpern**, 259 N. Y. 279, 181 N. E. 572, 83 A. L. R. 785 (Ct. App. 1932).

"Failure to obey a police order to 'move on' can be justified only where the circumstances show conclusively that the order was purely arbitrary and was not calculated in any way to promote the public order. As was said in the Galpern case, the courts cannot weigh opposing considerations as to the wisdom of a police officer's directions when he is called upon to decide whether the time has come in which some directions are called for."

Certainly in the handling of unforeseeable events officers should be given reasonably broad discretionary powers. This is especially true in the realm of traffic. Such ordinances afford sufficiently definite standards under the circumstances and are neither vague nor overbroad.

Another question raised by petitioner is whether he was in violation of Section 1142 at the time of his arrest, because at that time the crowd was either moving or had moved. Thus, contends petitioner the reason for his arrest was either gone or leaving. This however is no justification. If petitioner, the leader of the group, had this right then every other person in this crowd had the same right and if every other person had this absolute right then no right could rest in the City to regulate traffic on its sidewalks. It is only logical to assume that if petitioner had been permitted to defy the officer[1] and remain, his companions would have construed this as an open invitation to rejoin him. Certainly if he had the right to defy the order then each of the others in the crowd had an

[1] The testimony shows that petitioner was not seeking information but was making statements in defiance of the officer (R. 18, 20, 41, 52).

equal right. Obviously such a situation would be intolerable and gives justification to the rule that:

> "... police officers of a municipality should have reasonable authority and discretion. Indeed, in exigencies, it is vital to the welfare of the community."[2] Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222.

II-B.

THE LAST PARAGRAPH OF 1142 IS NOT VAGUE OR OVERBROAD.

Petitioner in this section of his argument seeks reversal of the conviction by attempting to attack the constitutionality of 1142 as construed by the Alabama Court of Appeals to constitute but one offense to require proof of both obstructing free passage and also failure to move upon request of a police officer.

As heretofore noted in this brief, the last paragraph of Section 1142 has been construed to contain a single offense, proof of which requires evidence that the accused blocked free passage of a public sidewalk and evidence of his refusal to move on after a police officer's request. **City v. Shuttlesworth,** 42 Ala. App. 296, 161 So. 2d 796; **Middlebrooks v. City of Birmingham,** ... Ala. App. ..., 170 So. 2d 424; **Phifer v. City of Birmingham,** 42 Ala. App. 282, 160 So. 2d 898. Respondent now directs its argument to sustaining the validity of Section 1142 as construed by the Appellate Courts of Alabama.

Petitioner's first attack on Section 1142 is that the construction of this ordinance post-dates petitioner's convic-

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[2] The inevitable consequences of the implications of petitioner's argument in *Shuttlesworth* is that he has a constitutional right to defy a police officer in performance of his duty, a doctrine, we submit, which tends to encourage and may well lead to rioting, destruction of property, in the hundreds of millions, violence, and death of scores of innocent people.

tion in Circuit Court. In this regard he relies upon **Bouie v. City of Columbia,** 84 S. Ct. 1697, 378 U. S. 347. The **Bouie** case, however, is not applicable in this case. The rule espoused in **Bouie** is simply that a statute written in such narrow language as to give no fair notice to defendant that his conduct is proscribed cannot be subsequently enlarged by judicial construction to cover his conduct. Actually the specific rule of **Bouie** is just a different application of the following rule taken from **United States v. Harris,** 347 U. S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989, and adopted by **Bouie:**

> "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Section 1142 gives fair notice to any person of ordinary intelligence that obstructing free passage on a sidewalk and refusing to obey an officer's request to move on is illegal. The construction placed on this ordinance by the Alabama Court is the only logical construction that could be placed upon it.

The Court of Appeals in construing this ordinance utilized rules of statutory construction designed solely to reach the most logical reasonable construction. These rules were formulated to give a certain amount of guidance to courts in their efforts to place logical and proper construction on statutory enactments. They were designed to insure that parties **affected** by statutes would have the benefit of consistently logical construction. As stated in **Blair v. Greene,** 246 Ala. 28, 18 S. 2d 688:

". . . (I)n the construction of a statute, the legislative intent is to be determined from a consideration of the whole act with reference to the subject matter to which it applies, and the particular topic under which the language in question is found. The intent so deduced from the whole will prevail over that of a particular part considered separately. This is in effect the statement as found in 59 C. J., p. 993, and recognized as the correct principle by numerous decisions of this court." The Alabama Supreme Court in **Peabody v. State**, 246 Ala. 32, 18 So. 2d 693, also applies this rule.

Certainly the rule above does no more than require those persons coming within the purview of statutory enactments to use common sense in reading them. Unless one completely blinds himself to the total effect of this enactment, no other conclusion can be reached other than the one reached by the Appellate Courts of Alabama.

The title of this ordinance is an aid in its construction. **Wages v. State**, 25 Ala. App. 84, 141 So. 709, Cert. denied 225 Ala. 10, 141 S. 713. The title of Section 1142 as amended reads:

"Streets and sidewalks to be kept open for free passage."

Certainly anyone reading the title of this ordinance would know that its subject was obstructing sidewalks. Anyone reading the entire ordinance would know that both sentences, the first and second relate specifically to some form of blocking traffic on the sidewalks and streets and any order to move would be authorized only when the first condition existed. It is only when the last sentence in this section is lifted and taken completely out of context that the possibility of a different construction

appears.[1] Appellant in this case, if he read the ordinance, could not come to any conclusion other than the one reached in the Middlebrooks, Phifer and Shuttlesworth cases. He was given fair notice of its proscription.

In reply to the several references by petitioner in his brief to the application of the prima facie rule and the conclusion reached that viewing Ordinance 1142 as proscribing but one unlawful act of obstructing and failing to move after obstructing passage on the sidewalk, the Court would during trial presume obstructing from the mere giving of the request to move, we feel such conclusion is erroneous. This erroneous conclusion is stated on pages 22 and 23 of petitioner's brief.

The **Shelton** case there mentioned dealt not with 1142, but the vehicular traffic section 1231. The **Middlebrooks** case dealt with an obstruction of the free passage on a sidewalk, not in connection with a demonstration, but after it was concluded. It is true, mention was made of the **Shelton** case, but the Court of Appeals was unanimous in its opinion that the evidence proved all of the elements of the offense under 1142 without resorting to any question of burden of proof.

It is also important to remember that in this, the Shuttlesworth case, the Court of Appeals found from the evidence the City had proved both of the elements required to constitute the offense. Shuttlesworth could not complain of such a rule, if such a rule exists, because it obviously was not applied to his case in the decision of that court in opinion written by Judge Cates.

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[1] The fact that the last sentence in Section 1142 as amended was not a separate paragraph also is evidence that the request to move mentioned therein necessarily relates to a failure of one who is blocking or obstructing free passage to move after request to do so by a police officer.

Petitioner also contends that Section 1142 is like the ordinance declared invalid in **Ex Parte Bell**, 19 Cal. 2d 488, 122 P. 2d 22. It is true that the two ordinances have some similarities, but the holding in Shuttlesworth and Bell are easily distinguished. **Ex Parte Bell** dealt with an ordinance that regulated picketing, which is a form of free speech protected by the Constitution. **Thornhill v. State of Alabama**, 310 U. S. 106, 60 S. Ct. 737. The Alabama Court of Appeals holds:

> "Section 1142, as amended, of the General City Code of Birmingham is not aimed at free speech. It directs the manner in which sidewalks and streets may not be used."

Absent the question of infringement of First Amendment freedom of speech, assembly or press,[1] the only requirement of specificity is that required to meet the due process requirements of the Fourteenth Amendment which is stated in **Bouie**, which quotes from the earlier case of **United States v. Harris**, 347 U. S. 612, 617, 74 S. Ct. 808, 812, 98 L. Ed. 989, which we have quoted ante page 25. This rule may be summarized as simply requiring that a defendant shall have reasonable notice of any act proscribed and for which a penalty might be inflicted upon him.

The ordinance here in question proscribing obstruction of free passage on a sidewalk and requiring the violator to move upon request of a police officer is as definite as the nature of such ordinance allows. Any person of reasonable intelligence could understand its prohibitions.

Petitioner speculates that specific situations could arise in which a person could be arrested for window shopping or some other similar conduct and, if so, the police officer

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[1] See Fort v. Civil Service Comm. of Alameda County, 38 Cal. Rptr. 625, 392 P. 2d 385.

would be applying the ordinance in an unconstitutional manner. No one could deny that this or any ordinance might be used improperly. But this fact could not condemn an ordinance designed to accomplish a legitimate control of the use of the streets and sidewalks to the end that they might perform the main function for which they were created.

The language of another California Appellate Court, **Ex Parte Bodkin**, 194 Pac. 2d 588, 591, 86 Cal. App. 2d 208, is particularly appropriate:

> "(6) (7) To say that the test of any legislation is what may be done thereunder without any limitation whatever is an absurdity, for every conceivable class of legislation has inherent in it the possibility of unconstitutional acts of enforcement. The two cases above cited referred to what would be the reasonable permanent effect of the legislation. The rule, as expressed by the Supreme Court, is that the state may incidentally, by reasonable regulations for the benefit of the general public, regulate but not prohibit the individual's exercise of his civil rights.
>
> (8) Since the ordinance here in question is solely a regulation of the use of the public streets, preserving them for the benefit of the public against obstructions and not a restriction on what may be uttered or published, the cases cited for the proposition that the state may not suppress civil liberties except in conformity with the 'clear and present danger' rule are not in point."

In this regard, we also desire to call attention to another well established principle that only one against whom an ordinance or statute has been unconstitutionally applied, unless its language is such that it cannot otherwise be applied, may take advantage of its unconstitutionality because of such improper application. **Cox v.**

Louisiana, 85 S. Ct. 453, 463; **United States v. Raines**, 362 U. S. 17, 80 S. Ct. 519, 522.

> ". . . one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." **United States v. Raines**, 362 U. S. 17, 80 S. Ct. 519, 522.

III.

Point III of Petitioner's Argument Is Without Merit.

In his argument number III petitioner argues that the first sentence of the last paragraph of Section 1142 is too vague and overbroad to meet First-Fourteenth Amendment demands. He has no argument directed to this theory except the statement adopting the argument from the preceding "paragraph" of his brief.

We feel respondent has fully answered these contentions in Sections I and II of this brief. We therefore, adopt these two sections in reply to this point or section of petitioner's brief.

We have heretofore cited and quoted from the recent decision of this Honorable Court in **Cox v. State of Louisiana**, 379 U. S. 536, 85 S. Ct. 453 (1965). We again direct attention to this case because we feel it has particular application here for the reason that there is great similarity in the statute there involved and the part of the ordinance here under attack. Both by their terms proscribe loitering or standing so as to block or obstruct free passage on the sidewalk. Neither the statute in Cox, nor the first sentence of the last paragraph of 1142 which we feel petitioner erroneously seeks to lift from its context and attacks here, provides for warning by a police officer prior to arrest.

While the statute in Cox was declared unconstitutional it appeared to be so declared only because it had been construed by the Supreme Court of Louisiana as to apply to public assemblies, conflicting with first amendment freedoms. Mr. Justice Goldberg discussed at length the distinction between ordinances or statutes confined in language and application to merely regulating the flow of traffic and those by force of language used or construction by the state courts impinge upon first amendment freedom.[1]

IV.

Point IV of Petitioner's Argument Is Without Merit.

Petitioner in this section of his argument contends for the reversal of the Alabama Court of Appeals decision because of alleged lack of evidence in the record to support a conviction under Count Two of the complaint. This argument is without merits for two reasons.

A.

THE EVIDENCE AND INFERENCES PROPERLY TO BE DRAWN THEREFROM SUPPORT A CONVICTION UNDER BOTH COUNTS ONE AND TWO.

Petitioner does not argue the invalidity of Ordinance 1231 of the City of Birmingham but in view of the narrow construction placed upon it by the Alabama Court of Appeals does not question its validity but chooses to take that court to task for holding the evidence sufficient to support this Count Two in **Shuttlesworth** while holding to to the contrary in **Phifer v. City of Birmingham**, 42 Ala. App. 282, 160 So. 2d 898.

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[1] 85 Sup. Ct. 453 and especially at pages 464-466.

As we understand the ruling of the Alabama Court of Appeals, that court considered that defendant Phifer had not been arrested on account of any incident related to a traffic violation or because he obstructed free passage on the sidewalk so as to force other pedestrians into the street reserved for vehicular traffic but because he came back to talk with Shuttlesworth after the latter's arrest and refused to leave after being warned three times to do so. In dealing with absence of evidence to convict Phifer under either Count One or Count Two, the Alabama Court of Appeals reached the following conclusions:

> "(6) Although the arresting officer testified that while he was pursuing Shuttlesworth into the store the defendant Phifer disappeared and he could not find him to arrest him at that time, we think it is clear from all the evidence that the officer himself did not consider that defendant had failed to comply with his order to clear the sidewalk, since he did not arrest him when he first came up to talk to Shuttlesworth, but kept urging him to 'move on'. We are of the opinion the evidence fails to prove the defendant guilty under count one of the complaint.
>
> (7) The charge in the second count of the complaint is for a violation of Section 1231, of the General City Code of Birmingham. This section appears in the chapter regulating vehicular traffic, and provides for the enforcement of the orders of the officers of the police department in directing such traffic. There is no suggestion in the evidence that the defendant violated any traffic regulation of the city by his refusal to move away from Shuttlesworth when ordered to do so.

The evidence is insufficient to sustain the verdict under either count of the complaint.'"[1]

The evidence in Petitioner Shuttlesworth's case is exactly the reverse. It is clear he was arrested for obstructing free passage on the sidewalk resulting in pedes-

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[1] The opinion in *Phifer v. City of Birmingham*, 42 Ala. App. 282, 160 So. 2d 898, 900, 901, clearly quotes the evidence relied upon by it to support these conclusions:

"Shuttlesworth was placed in custody and taken to the west curb to await transportation to the city jail, and while they were standing there the defendant came up and started conversing with Shuttlesworth. The witness told defendant Shuttlesworth was under arrest and he could not be allowed to talk with him, but Phifer continued to talk. The officer said: 'I informed him if he did not move away and discontinue his conversation with the defendant (Shuttlesworth) he too would be placed under arrest and taken to the city jail.' The witness was asked on cross-examination:

'Q. Now you arrested him at that time?'
'A. After I had asked him to move some three times.'
'Q. To move away from the Defendant Shuttlesworth?'
'A. Yes, sir.'

* * * * * * * *

'Q. And only after he insisted on talking to Reverend Shuttlesworth did you arrest him?'
'A. That's right.'

The witness stated further that six or seven police officers were present when Shuttlesworth and Phifer were placed in the police car.

One of these officers testified the arresting officer told Phifer to move on, that he would not be allowed to talk to Shuttlesworth. Phifer said 'I will go with him,' and Officer Byars stated: 'You are under arrest too.' The witness was asked: Q. 'What did he tell him he was under arrest for?' His answer was: 'Refusing to obey the lawful command of an officer.'

"Another officer testified: 'He (Phifer) came up and said he wanted to talk to Shuttlesworth, and Officer Byars told him he couldn't, that he was under arrest, and he said, "Well, if you do, I will have to arrest you too because I have told you to leave." And he said, "Well, I will have to be arrested." And he placed him under arrest for failing to obey an officer.'

Two other officers testified it was after Officer Byars had told Phifer twice to move on, that he couldn't talk to Shuttlesworth, that the defendant was arrested."

trians having to get out into the street reserved for vehicular traffic, all in a group including Phifer and some ten others. Phifer and the others obeyed the request of the officer to cease obstructing free passage on the sidewalk, hence none was arrested, except Phifer and his conviction was reversed by the Alabama Court of Appeals.

The factual finding in **Shuttlesworth v. City of Birmingham,** 42 Ala. App. 296, 161 So. 2d 796, 797, which is amply supported by the evidence and inferences properly to be drawn therefrom is stated:

> "The evidence, as introduced by the City, tended to show that the defendant was a member of a crowd of about ten or twelve people standing on the corner of 19th Street and 2nd Avenue, North, in the City of Birmingham, and that this crowd was blocking the sidewalk to such an extent that some of the other pedestrians were forced to walk into the street to get around them. The crowd was accosted by one Officer Byars and asked to clear the sidewalk so as not to obstruct pedestrian traffic. The evidence further showed that the crowd remained and when requested to disperse for the third time by Officer Byars, defendant Shuttlesworth said, 'You mean to tell me we can't stand here in front of this store?' at which time Officer Byars informed the defendant that he was under arrest. Officer Byars testified that at the time of the arrest everyone had moved or was moving away except Shuttlesworth. After being told that he was under arrest, Shuttlesworth moved away saying, 'Well, I will go into the store.' Officer Byars then followed Shuttlesworth into Newberry's Department Store and took him into custody."

We respectfully urge that the Alabama Court of Appeals was correct in holding both counts one and two are sufficiently supported by the evidence.

Review of the ruling of the Circuit Court denying the motion of Shuttlesworth to exclude the evidence was properly sustained because there was evidence before the Court sufficient to make a prima facie case under Counts One and Two.[2]

On certiorari, the ordinary practice of this Honorable Court is not to review the weight or sufficiency of the evidence. On Page 19 of his brief petitioner alludes to and concedes this practice.[3]

Cases of the United States Supreme Court supporting this rule include: **Whitney v. California**, 274 U. S. 397, 47 S. Ct. 641, 71 L. ed. 594; **Milk Wagon Drivers Union v. Meadowmoor Dairies**, 312 U. S. 287, 61 S. Ct. 552, 85 L. ed. 836; **Portland R. L. & P. Co. v. Railroad Commission**, 229 U. S. 397, 33 S. Ct. 829, 57 L. ed. 1248.

Of course, we are aware that if there was an entire absence of any evidence showing the commission of any offense charged by the City the principle asserted in **Thompson v. City of Louisville**, 362 U. S. 199, 80 S. Ct. 624, 4 L. ed. 2d 654, would apply.

We think the evidence recited summarized by the Court of Appeals of Alabama in the Shuttlesworth case[4] which we have quoted ante page 34 is more than adequate to support a conviction of petitioner, Shuttlesworth, under

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[2] Tarver v. State, 85 So. 855, 17 Ala. App. 424; Drummond v. State, 67 So. 2d 280, 37 Ala. App. 308; Martin v. State, 81 So. 851, 17 Ala. App. 73.

[3] The statement is made by petitioner in connection with the testimony of Officer Byars, which he says under ordinary practices of this Court "must escape strict review here" (Brief, p. 19).

[4] 161 So. 2d 796, at page 797.

both Counts one and two of the complaint and is consistent with the record in this case.[5]

But if we were to concede arguendo that the evidence was not sufficient to convict under Count Two of the complaint, it was undoubtedly sufficient to convict under Count One. In fact, we fail to find any serious contention of insufficiency of evidence to support the complaint other than the argument under Section IV of Petitioner's brief which is confined to Count Two.

B.

THE CONVICTION OF PETITIONER SHOULD BE SUSTAINED EVEN IF THERE WAS COMPLETE ABSENCE OF EVIDENCE TO SUSTAIN A CONVICTION UNDER COUNT TWO.

The judgment entry appearing on pages 10 and 11 of the record shows that petitioner was found guilty as charged in the complaint, but was fined and sentenced for one offense only. That is, the sentence was the same whether rested upon Count one or Count two.[6]

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[5] The evidence is considered in "Statement of the Case", this brief, ante pages 2-8.

[6] "Sec. 4. General Penalty. Any person who shall fail or neglect to perform any duty imposed by this code, or who shall fail or neglect to do or perform any act or series of acts required to be done or performed by this code, or who shall fail or neglect to perform any duty, act or series of acts, the neglect or failure of performance of which is declared unlawful or made punishable by this code, or who shall do or perform any act or series of acts which is prohibited, made unlawful, or made a misdemeanor by this code, or who shall violate any provision of this code, shall, upon conviction therefor, be punished by a fine not exceeding one hundred dollars or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine and imprisonment; and, in the event the fine and costs are not presently paid the defendant shall be required to work out the fine and costs under the direction of the city authorities, allowing one dollar for each day's

Where a judgment of conviction is general, it will not be reversed because of the insufficiency of the evidence as to some of the counts, where it is sufficient as to one count and the sentence is within the statutory limit which may be imposed on such count. **U. S. v. Parillo,** 299 F. 714; **Clift v. U. S.,** 22 Fed. 2d 549; **Barton v. U. S.,** 25 Fed. 2d 967, cert. denied 49 S. Ct. 24, 278 U. S. 621, 73 L. ed. 542.

This is analogous to the proposition that a general conviction on a complaint will not be reversed where one of several counts is good, if the sentence imposed did not exceed that which could be imposed under the good counts. **Pierce v. U. S.,** 40 S. Ct. 205, 252 U. S. 239, 64 L. ed. 542, affirmed 245 F. 878; **Claassen v. United States,** 142 U. S. 140, 146, 12 S. Ct. 169, 35 L. ed. 966. In fact the Circuit Court of Appeals of the Sixth Circuit in **Clift v. U. S.,** 22 Fed. 2d 549, 550, cites **Claassen** in support of the principle asserted in the preceding paragraph.

The rule referred to in the last two preceding paragraphs is also accepted in other state jurisdictions[7] and has been applied by the Alabama Appellate Courts uniformly and without exception. **Andalusia Motor Company v. Mullins,** 183 So. 456, 28 Ala. App. 201, cert. denied

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service. No female shall be required to work on the streets of the city. The penalties provided in this section shall apply in all cases other than offenses for which a different penalty is specifically prescribed; provided, that the provisions of this section shall not apply to violations of official duty imposed by this code upon officers or employees of the city as such, unless the provision imposing the duty also expressly makes the violation thereof unlawful or punishable." General City Code of the City of Birmingham.

[7] Yeats v. Mooty, 175 So. 719, 128 F. Ca. 658 and Smith v. McLaughn, 184 P. 2d 177, 81 Cal. App. 2d 815, are both directly in point on the proposition that a general judgment must be sustained if the evidence sufficiently supports either of two or more counts of the complaint.

183 So. 460, 236 Ala. 474; **White v. Jackson,** 62 So. 2d 477, 36 Ala. App. 643; **White Roofing Co. v. Wheeler,** 106 So. 2d 658, 39 Ala. App. 662, cert. denied 106 So. 2d 665, 268 Ala. 695; **Morgan v. Embry,** 85 So. 580, 17 Ala. App. 276; **Jones v. Belue,** 200 So. 886, 241 Ala. 22; **Turnipseed v. Burton,** 4 Ala. App. 612, 58 So. 959; **Long v. Leith,** 16 Ala. App. 295, 77 So. 445.

CONCLUSION.

The Judgment of the Alabama Court of Appeals affirming petitioner's conviction should be affirmed and or the petition for certiorari dismissed.

Respectfully submitted,

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